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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 179.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

vs.

JOHN F. GUENTHER,
Respondent.

PETITION FOR REHEARING.

WILLIAM M. BYRNES,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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Now comes the above named respondent, John F. Guenther, and presents this his petition for a rehearing of the above entitled cause and in support thereof respectfully presents the following:

This case presents for the Court's consideration and determination the proper construction to be placed on an ordinance enacted by the Council of the City of Lakewood, Ohio and also upon the phrase *"fixed by law"* contained in a policy of insurance issued by the petitioner to the respondent, the precise questions being whether or not that phrase in a strict construction of the policy of insurance should be construed to mean *fixed by municipal ordinance,"* and whether or not the ordinance fixes an age limit.

During the argument of this case counsel for the respondent was advised that the Court concurred in his statement of the law that insurance policies are liberally construed in favor of the assured and strictly against the insurance company and secondly that if the language in an insurance policy is susceptible of a *broad* and also of a

restricted meaning the Court will adopt *that meaning* of the language which will *grant the indemnity rather than deny it.*

The District Court and Court of Appeals both held that the term "fixed by law" as used in the policy of insurance was reasonably susceptible of the meaning "fixed by a law enacted by a state legislature," the sovereign law making body in the state and thus could be so construed as to carry out the purpose of the contract, namely the granting of indemnity to the assured.

It must be conceded that the common purpose that the insurance company and Guenther had at the time the policy was issued was to indemnify Guenther against personal injury claims, regardless as to where accidents might occur and it has been the universal practice of courts of last resort to construe insurance policies to give them force and effect, if possible. We respectfully submit that the judgments of the courts below in enforcing the policy and granting the indemnity therein provided were in strict accord with the great weight of judicial authority.

The Court will take judicial notice of the fact that the automobile, as a means of transportation, is universally used by the entire population of this great country and automobiles are now used to transport passengers and merchandise from the Atlantic to the Pacific and from the Great Lakes to the Gulf of Mexico. This Court will also take judicial notice of the fact that continental United States is made up of a great many independent states, each sovereign and supreme within its own limits and the insurance company at the time it issued its policy had in mind that the insured automobile might be driven from Cleveland to Portland, Maine or to Portland, Oregon, to San Diego, California or to Key West, Florida or to any other point within the United States. It also had in mind that the insured automobile would be driven by persons other than

the assured and by minors. It was desirous of limiting its liability when the automobile was operated by minors because it fixed its own minimum age and refused to accept any responsibility in the event that the car was operated by any one under the age of sixteen. It also fixed the minimum age of the operator as that "fixed by law." The policy was a practical contract and not a theoretical one. The duties and obligations imposed on the assured, of necessity, must be practical and it must be conceded that the insurance company did not intend to impose upon the assured any condition with which he could not comply or a duty impossible of performance, in order to have his insurance effective.

In Ohio alone we have 1338 townships, each with the right to fix a minimum age limit for automobile operators. Under this contract of insurance must the automobile owner know the minimum age limit fixed by municipal ordinance of every municipality through which his automobile may be driven under penalty of losing in time of need the indemnity for which he pays? Within the 48 states of the union there are at least 50,000 municipalities deriving their power and authority from the state within whose limits they are located. The insured automobile may be driven through any one of these 50,000 municipalities. As a practical proposition, we confidently assert that no automobile owner could ascertain the names of all the municipalities through which his car might pass, much less know the municipal requirements as to the age of drivers.

A trip of 250 to 300 miles in a single day is today the rule rather than the exception when automobiles are used for touring. Such a trip is an every day occurrence for commercial automobiles. Is it possible or practicable for any assured to know the municipal limits of each city, town and village through which his car would pass on a day's journey? Is it within the realm of practicability for him

to know or ascertain the regulations of each municipality as to the age of drivers? It is common knowledge that municipal councils do not have uniform ordinances with reference to the age limits of drivers. Some will have fixed the ordinance at sixteen, others perhaps at fourteen, some at eighteen, some at nineteen, twenty or twenty-one and many will fix no age limit whatever.

If the term "fixed by law" is to be construed as meaning "fixed by municipal ordinance," then we say that as a practical matter the assured will probably have to take his chances. He may be protected in one municipality and he may enter another where he is not protected and these municipalities may be adjoining and the dividing line nothing more than an imaginary line in the center of some street. The roadway on both sides of this dividing line will be exactly the same, traffic conditions will be exactly the same, the automobile will be the same, the driver will be the same, the driver's age however will comply with the terms of the policy on one side of this imaginary line but on the other side of the imaginary line it will not. The policy will be enforcible and the insurance company liable to pay the indemnity, if the accident occurred on one side of this imaginary line but if it occurred ten feet on the other side of the imaginary line there would be no liability on the part of the insurance company and no indemnity for the assured. Certainly this condition of affairs was not within the contemplation of the parties at the time the policy was issued and as said by the District Court, the soliciting agent would be unable to sell a policy if we were to tell his prospect that this interpretation would be placed upon it by the adjuster.

> "A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent and of quite a different one in the hands of the adjuster."
>
> *Travelers Insurance Company vs. Dunlap,* 160 Ill. 642-647.

As a practical proposition therefore in the course of a single day's journey from Cleveland to Cincinnati, a trip of 260 miles, under exactly the same circumstances as to road conditions, traffic conditions, ability and age of driver and automobile, the policy would be enforcible and unenforcible a hundred times or more.

If the decision of the Court in this case is to be the law of the land, then, to be on the safe side, whenever the assured entrusts his automobile to a minor he must know the municipal ordinance regulating age in every municipality within Ohio and there are 1338 townships in this state; he must know, while touring, the municipal regulations of every township in the country and there are at least 50,000 of them. On the other hand, representatives of the insurance company can sit idly by until they receive a report of an accident, then communicate with the city or village clerk of the place where the accident occurred, ascertain as to whether or not there is any municipal regulation as to the age or drivers; if there is none, and the driver was sixteen years of age or over, give the service provided for in the contract, whereas on the other hand if there is a regulation that has been violated, whether the limit be twenty-one or anything below that to sixteen, it can deny liability.

The odds, therefore, are 1338 to 1 in Ohio alone against the assured and in favor of the insurance company and in the United States the odds are 50,000 to 1 against the assured. Is this a liberal construction of the policy in favor of the assured? We respectfully submit therefore that this construction could not have been in the mind of the insurance company or the assured at the time the policy was issued.

If "fixed by law" means fixed by state law as decided by the Court of Appeals, the assured would have definite information as to the laws of the various states as to age of automobile drivers. He knows or could easily ascertain

that the state of Arkansas fixes the age limit at eighteen; the states of New Jersey and Indiana fix it at seventeen; nineteen states fix it at sixteen; nine states at fifteen; six states at fourteen; one state, South Carolina, at twelve and ten states fix no limit. Thus in forty-five out of forty-eight states he knows the legal age limit of automobile drivers is fixed at sixteen or under. In forty-seven states Guenther would have been indemnified under the circumstances of the case at bar. Did not the insurance company have in mind this almost universal legal age of sixteen or under as the age fixed by law rather than the age that might be fixed by any one of 50,000 municipalities? Is this not the more apparent when it fixes its own minimum at sixteen?

If this Court, therefore, should adopt the judgment of the Court of Appeals and limit the term "fixed by law" to that limit fixed by state legislatures there would be no condition impossible of performance placed upon the assured and both the assured and the insurance company would have equal opportunity of knowing whether or not the policy was enforcible at any given place.

If the assured intends to drive his automobile only in Ohio he can easily ascertain whether or not the state legislature has fixed a minimum driving age. If his journey takes him across the Ohio River into Kentucky he will know that no one between fourteen and sixteen is permitted to drive unless accompanied by an adult and that any one over sixteen may drive. He will know that in Tennessee there is no age limit as in Ohio; that in Georgia the minimum age limit is sixteen. In Florida the minimum age limit is fourteen unless the driver is accompanied by the owner or a licensed chauffeur. If his route takes him through West Virginia, North Carolina and South Carolina he will know that the minimum age in West Virginia is fourteen, in North Carolina sixteen and in South Carolina twelve. Thus a practical effect could be given to the phrase "fixed by law" and the policy could be in force all the time rather

than in force and ineffective times without number and at places unknown to the assured, and because of the practical importance of this proposition to every automobile owner in the United States, we respectfully urge the Court to reconsider this case.

We respectfully present for the further consideration of the Court the fact that in the Lakewood ordinance there was *no age limit fixed by it* for the operator of an automobile.

We also desire to refer the Court to the decisions cited in our brief on pages 18, 19 and 20, holding that a *municipal ordinance* is not a *law* under the circumstances of the cases cited.

The question presented by this record is not whether a municipal ordinance may impose a more onerous obligation upon drivers of automobiles than that imposed by state law, but rather "Can the policy be reasonably construed to effect its purpose, indemnity for the assured?"

Does not the fact that the two Federal Courts in this case reached a conclusion different from that reached by this Court indicate that there is some doubt, to say the least, as to the meaning of this phrase "fixed by law" and if there be some doubt should not that doubt be resolved in favor of the assured? Is not this especially true when the insurance company, by the use of the words "or municipal ordinance" after the word "law" in the phrase "fixed by law" could have eliminated all doubt had it intended to place on the phrase "fixed by law" the meaning "fixed by municipal ordinance"?

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Court of Appeals be upon further consideration affirmed.

WILLIAM M. BYRNES,

Counsel for Respondent.

CERTIFICATE OF COUNSEL.

I, William M. Byrnes, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM M. BYRNES,
Counsel for Respondent.